

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

RAYMOND G. POZOIC JR.,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1863 MDA 2012

Appeal from the Judgment of Sentence of August 22, 2012,
in the Court of Common Pleas of Dauphin County,
Criminal Division at Nos. CP-22-CR-0000715-2009
CP-22-CR-0001419-2011
CP-22-CR-0004367-2008

BEFORE: PANELLA, ALLEN and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.:

FILED MAY 30, 2013

This case is an appeal from the judgment of sentence imposed on Appellant after his probation was revoked. He seeks to challenge the discretionary aspects of his sentence. We affirm the judgment of sentence.

As a result of multiple convictions, Appellant was serving probation. After finding Appellant had violated the terms thereof, the lower court revoked his probation and sentenced Appellant to incarceration on August 22, 2012. Appellant was represented during the revocation-sentencing proceedings by Attorney Amanda Batz.

* Retired Senior Judge assigned to the Superior Court.

On August 28, 2012, the Dauphin County Clerk of Courts received from Appellant a *pro se* document entitled "Direct Appeal & Motion to Appoint Counsel [sic]." In that document, Appellant listed the three Common Pleas case numbers on which his probation had been revoked, indicated he was filing a direct appeal and asked for the appointment of appellate counsel. While the document was not worded in an altogether clear fashion, it made reference to Appellant having been sentenced on August 22, 2012. It also listed the name of the judge who imposed the revocation sentence. A letter included by Appellant along with the document indicated he was representing himself until the court appointed counsel.

The clerk of courts docketed the aforesaid item. On August 29, 2012, in an apparent effort to comply with Pa.R.Crim.P. 576(A)(4), the clerk forwarded a copy of the *pro se* document to Attorney William Shreve.¹ Attorney Shreve had been representing Appellant with respect to a petition under the Post Conviction Relief Act ("PCRA") on one or more of Appellant's three underlying cases since August 1, 2012.² The clerk did not forward

¹ The rule directs that, upon receipt of a *pro se* filing from a represented defendant, the clerk of courts is to file and docket the document and then forward a copy thereof to counsel of record. Pa.R.Crim.P. Rule 576(A)(4).

² Some of the documents and docket entries relating to Appellant's PCRA efforts reference only one of his underlying case numbers while other PCRA documents and entries reference all three. In any event, it is clear that Attorney Shreve was PCRA counsel for Appellant on at least one of the instant underlying case numbers.

Appellant's *pro se* filing to Attorney Batz, Appellant's counsel in the revocation proceedings.

On October 22, 2012, the clerk of courts received from Appellant an additional *pro se* document indicating Appellant was seeking to appeal his revocation sentence. The document also asked for appointment of appellate counsel. The clerk docketed the October 22nd filing on October 23, 2012.

On November 9, 2012, the clerk of courts received another *pro se* motion from Appellant for appointment of appellate counsel. Attorney Shreve entered his appearance with this Court on November 21, 2012. The lower court later denied Appellant's motion for counsel as being moot in light of Shreve's entry of appearance.

Appellant's appeal eventually came before us. Before addressing his intended challenge to his sentence, we will consider the timeliness of this matter because, unless this appeal was timely filed, we do not have jurisdiction to entertain its merits. ***Commonwealth v. Wrecks***, 934 A.2d 1287, 1289 (Pa. Super. 2007).

A notice of appeal must be filed within thirty days of a revocation sentencing. Pa.R.Crim.P. 708(D), 903(c)(3). The lower court posits that the instant appeal should be quashed as it was not filed until October 2012, beyond the thirty-day deadline. Finding that Appellant's *pro se* document

received by the clerk on August 28, 2012, constituted a valid notice of appeal, we disagree.

We understand that, normally, *pro se* filings from represented defendants are nullities. ***Commonwealth v. Piscanio***, 608 A.2d 1027, 1029 n.3 (Pa. 1992). However, in ***Commonwealth v. Cooper***, 27 A.3d 994, 1007-08 (Pa. 2011), the Pennsylvania Supreme Court recently declined to treat a *pro se* notice of appeal as being void. Part of the court's reasoning was that the defendant had been uncertain about whether his counsel would continue to represent him on appeal. ***Id.*** at 1007 n.19. To be sure, the ***Cooper*** case involved a number of unusual facts not present here. ***See id.*** at 996, 1005-07. Nevertheless, we believe that treating the *pro se* filing of August 28, 2012, as a valid notice of appeal is consonant with the Supreme Court's concerns and approach in ***Cooper***. Although Batz was the attorney who had the responsibility to pursue any desired appeal by Appellant, Appellant's *pro se* filing of August 28th and his letter accompanying that filing evidenced his belief that he was not represented by appellate counsel. Appellant's requests for appellate counsel in October and November 2012 are additional evidence of his belief and/or uncertainty.

Additionally, we note that, while evidently trying to meet its duty under Pa.R.Crim.P. 576(A)(4) to forward a copy of the *pro se* filing to counsel of record, the clerk improperly sent the copy to the wrong lawyer, Attorney Shreve. Attorney Shreve, who then represented Appellant on his PCRA matter, subsequently entered his appearance on this appeal.

However, at the time the clerk sent the copy of Appellant's August 28, 2012, *pro se* filing to Shreve, Shreve did not yet represent Appellant with respect to issues arising from the probation revocation. Whatever Attorney Shreve's arguable obligations might have been upon receipt of the *pro se* document, the fact is that the clerk did not fulfill its Rule 576(A)(4) obligation to send a copy of the *pro se* document to Appellant's counsel on the revocation case. Had the clerk rightly sent a copy of the *pro se* filing to Attorney Batz within the thirty-day appeal period, Batz may have filed a counseled notice of appeal. The clerk's failure constitutes a breakdown in the machinery of the court system that further militates in favor of accepting Appellant's *pro se* filing as an effective notice of appeal. **See Commonwealth v. Patterson**, 940 A.2d 493, 498-500 (Pa. Super. 2007) (discussing circumstances where administrative errors by lower court can warrant this Court in overlooking strict filing requirements for appeal). Additionally, the clerk's mistake buttresses our own conclusion that there was confusion about the status of Appellant's representation on appeal.

As to the content of Appellant's August 28, 2012, *pro se* filing, it revealed his desire to appeal his revocation sentence. We understand that the content, and the overall form, of that filing was not in perfect compliance with the prescriptions for notices of appeal under Pa.R.A.P. 904. Even still, given that Appellant filed his document within the appeal deadline and given that the document did express his desire to appeal his judgment of sentence, we will view it as a valid notice of appeal. **See Commonwealth**

v. Willis, 29 A.3d 393, 395-96 (Pa. Super. 2011) (indicating defects in timely notice of appeal do not necessarily render it invalid); Pa.R.A.P. 902.

Based on the foregoing considerations, we will not quash this appeal but, instead, we will view it as having been timely filed on or about August 28, 2012, via what we now consider to be Appellant's *pro se* notice of appeal.³ Accordingly, we turn to Appellant's intended substantive challenge.

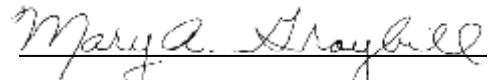
Appellant wants to argue that the lower court erred by sentencing him without placing any reasons on the record for the sentence. This claim is a challenge to the discretionary aspects of sentencing. **Commonwealth v. Kalichak**, 943 A.2d 285, 291 (Pa. Super. 2008). In order to pursue such a claim on appeal, Appellant needed to preserve it during the revocation-sentencing hearing and/or in a post-sentence motion. **Id.** at 289. Appellant did not do so. Therefore, his claim has been waived and he cannot raise it now. **Id.**

³ Because Appellant was apparently incarcerated when he mailed his *pro se* notice of appeal, his actual filing date might arguably be one or more days before August 28th by virtue of the prisoner-mailbox rule. **Commonwealth v. Jones**, 700 A.2d 423, 426 (Pa. 1997). However, his mailing date is not evident from the documents of record. In any event, we need not consider the prisoner-mailbox rule any further in this case because, even accepting August 28, 2012, as the filing date, it is evident Appellant filed this appeal within thirty days of his sentencing on August 22, 2012.

Based on our foregoing discussion, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.


Deputy Prothonotary

Date: 5/30/2013